

that his foreclosure action had been dismissed on a point of law and that he was advised that he was entitled to restitution of the sum of \$12,693.50, the amount originally lent to the applicant/chargor by virtue of section 66 of the Contract Act, 1950 (Revised 1974). He also contended that his counsel had raised the issue of restitution at the hearing of the foreclosure action and he was advised to say that the present application was bad in law and should be struck out.

It is apparent from the deposition of the respondent/chargee that the matter of restitution is *res judicata* and this court has no jurisdiction to reopen the issue for further arguments. The record also reveals that consequent to the dismissal of his action the respondent/chargee applied for further argument of the case pursuant to Order 54 rule 22 of the Rules of the Supreme Court. That application was refused by the judge and the necessary certificate was issued on November 15, 1979. The respondent/chargee did not lodge any appeal and the order was extracted on December 13, 1979, which puts an end to the litigation. Obviously the respondent/chargee was satisfied with the decision of the court at the time or his counsel had advised him not to proceed further in which case applicant/chargor would be entitled to the reliefs sought.

In perusing the applicant's/chargor's affidavit sworn on March 5, 1978 which was referred to in his present affidavit supporting this application it was there contended that he had settled the whole of the respondent's/chargee's claim. This contention at paragraph 8 of the affidavit was marked 'X' by the judge who dealt with the case. It was obvious that the judge had considered this contention when the issue of restitution was argued before him, when in any event he decided to dismiss the whole action.

In these circumstances, the reliefs sought by the applicant/chargor are granted in terms.

Order accordingly.

Solicitors: Mohamed Elyas Majeed; Chong Thian Seng.

DIRECTOR GENERAL OF INLAND REVENUE v. HUI THONG CO. SDN. BHD.

[A.C.J. (Hashim Yeop A. Sani J.) September 26, 1980]
[Kuala Lumpur — Tax Appeal No. 1 of 1980]

Revenue Law — Income Tax — Family company carrying on business as insurance and general agents — Investment in land — Sale of land for profit — Whether adventure in nature of trade — Income Tax Act, 1967, s. 2.

In this case the respondent was a family company carrying on business as insurance and general agents. Subsequently the company began to invest in land for the purpose of obtaining income from rentals. In the course of doing so, the company purchased four vacant lots of land. No steps were taken to erect buildings on the land or to submit building or development plans. The lands were sold at a profit and subsequently the company purchased two blocks of buildings from which it received rental income. The company was assessed to tax on the profits of the sale of the vacant lands but on appeal to the Special Commissioners, it was decided by a majority that the purchase and sale of the lands did not constitute an adventure in the nature of trade. It was held that

A the transaction constituted a realization of investment and therefore no tax was payable. The Director-General appealed by way of case stated.

B **Held**, dismissing the appeals, in this case the Special Commissioners in their majority decision found that the respondent had acquired landed property and after an interval of time disposed of them and substituted them with some other property which were still giving rental income to the company. Looking at the surrounding circumstances of the transaction and in the absence of any evidence to indicate that the original purchase was solely for speculative purposes, it was quite difficult not to agree with the findings of the Special Commissioners in the majority decision.

Cases referred to:-

- (1) *Edwards v. Bairstow & Harrison* (1955) 36 T.C. 207.
- (2) *International Investment Ltd. v. Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4.
- (3) *California Copper Syndicate (Ltd. & Reduced) v. Harris* 5 T.C. 165, 166.
- (4) *Leeming v. Jones* 15 T.C. 333, 340.
- (5) *Commissioners of Inland Revenue v. Livingston* 11 T.C. 538, 542.
- (6) *Commissioners of Inland Revenue v. Reinhold* 34 T.C. 389, 394.
- (7) *Rutledge v. Commissioners of Inland Revenue* 14 T.C. 490, 496.
- (8) *Commissioners of Inland Revenue v. Reinhold* 34 T.C. 389.

TAX APPEAL.

Zulkifli Ahmad (Federal Counsel) for the appellant.

E S. Woodhull (Ahmad Johari bin Tun Abdul Razak with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: This is an appeal by way of Case Stated by the Special Commissioners of Income Tax. The appellant, the Director General of Inland Revenue, is dissatisfied with the majority decision of the Special Commissioners as set out at pages 28-33 of the case stated. In his submission counsel for the appellant relied substantially on the statement of the dissenting decision as set out at pages 11-28 of the case stated.

G It is set out in the Deciding Order that the Special Commissioners found, *inter alia*, that —

- (a) the appellant before them (the respondent here) is a family company incorporated on December 30, 1953 and commenced business as insurance and general agents;
- (b) the main business activity of the said company before 1960 was insurance business but after 1960 the insurance business declined and the company started to invest in houses for the purpose of obtaining income from rentals;
- (c) on September 20, 1967 the company entered into four separate agreements with regard to the purchase of four vacant lots of land for a total consideration of \$75,000 including the amount for removal of squatters;
- (d) these vacant lots which were subdivided by the vendor were situated in the area of Jalan Masjid India, Kuala Lumpur, and formed part of a proposed development complex;
- (e) the final payment for the purchase of these lots was made in February, 1971 and separate docu-

- ments of registered titles for the subdivided vacant lots were issued to the company in April, 1971;
- (f) the company did not erect any buildings on the vacant lots and no building or development plan was submitted for approval;
 - (g) on September 29, 1972 the company entered into an Agreement of Sale with a certain individual for sale of the vacant lots for a consideration of \$293,575 which amount was paid by three instalments on September 23, 1972, December 22, 1972 and February 22, 1973;
 - (h) the company was assessed for Year of Assessment 1974 in the sum of \$90,982.40 on the surplus realised on the sale of the vacant lots;
 - (i) in January, 1974 the company purchased two blocks of buildings for a total consideration of \$180,000 and commenced to receive increased rental income from these premises. At the date of hearing before the Special Commissioners the company still retained ownership of these premises.

The principal question for determination before the Special Commissioners was whether the purchase of the four vacant lots for a total consideration of \$75,000 and the subsequent sale of these lots for a consideration of \$293,575 constituted "an adventure in the nature of trade" within the meaning of the definition of "business" in section 2 of the Income Tax Act, 1967. The majority of the Special Commissioners was of the opinion that the purchase and sale of the said lots did not constitute an adventure in the nature of trade. At page 33 of the case stated the majority opinion was as follows:—

"In view of what we have stated above, we were of the opinion that the respondent did not embark on an adventure in the nature of trade in buying and selling the said vacant lots, but the transaction constitutes a realisation of investment and we therefore allowed the Appeal."

In the dissenting decision the finding was that the purchase and sale constituted an adventure in the nature of trade. The finding at page 28 read as follows:—

"I do not doubt that the purchase and sale of the vacant lots did not constitute ordinary trading in the buying and selling of land but it did as a matter of law constitute an *adventure* in the nature of trade."

What meaning should be given to certain words is a question of law — see *Edwards (H.M. Inspector of Taxes) v. Bairstow & Harrison*.⁽¹⁾ What is the meaning to be given to the words "adventure in the nature of trade" appearing in the definition of "business" in section 2 of the Income Tax Act, 1967 is certainly a question of law. But in arriving at the proper meaning of these words we have also to consider the facts involved and the findings on these facts arrived at by the Special Commissioners.

The guidelines in approaching this problem have been discussed in a great number of cases. Where the findings of the Special Commissioners are basically findings of fact the power of the court to interfere is very limited. The court will not ordinarily disturb any finding of facts unless there is no evidence to justify the finding or where the Commissioners have applied erroneous tests in arriving at their conclusions or have drawn a wrong inference on the facts or have

- A otherwise misdirected themselves in law. In *International Investment Ltd. v. Comptroller-General of Inland Revenue*⁽²⁾ the Privy Council agreed with and adopted the following statement from the judgment of Raja Azlan Shah F.J. (as he then was):

"...there is no justification for reversing the determination of the Special Commissioners unless they had misdirected themselves in law, or proceeded without sufficient evidence in law to justify their conclusion."

- B In this case in their majority decision, the Special Commissioners also found that—

"In 1967, the respondent sold house No. 1, Jalan Dispensary, Petaling Jaya to the then occupant who offered to buy it after collecting rent for about 2 years. The sale proceeds were utilised to settle a short term loan from one of the directors. In 1971, house No. 33, Jalan Othman, Petaling Jaya, which was built by the respondent in 1955 and let out since then was sold. The sale proceeds were utilised for payment of part of the balance of the purchase price of the said vacant lots."

- C The surplus realised from the sale of the said two houses were credited to Capital reserve account in the accounts of the respondent and was not available for distribution as dividends to share holders. The Special Commissioners noted that the appellant then did not treat the surpluses as income. In the balance sheets produced it was also shown that all the landed properties were treated as fixed assets. Apparently the Special Commissioners could not understand why the surplus derived from the sale of the said vacant lots
- E which was also credited to the Capital reserve account was treated as income and assessed to tax by the appellant.

At page 30 of the case stated the Special Commissioners in their majority decision stated as follows:—

- F "The question for our determination is whether the respondent embarked on an adventure in the nature of trade in buying and selling the said vacant lots as it failed to put up buildings in the vacant lots as originally intended. The respondent argued that the said vacant lots were bought as an investment to put up buildings but later it was not able to do so due to lack of finance and increase in cost of building materials. But it is our opinion that it had not changed its intention as the sale proceeds were subsequently used to buy two houses in the same locality as the vacant lots and these houses generated substantial rent income as disclosed in the accounts. These houses are held as investment even now."
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- H The titles were transferred to the company on April 15, 1971 and the sale in question was made on September 29, 1972, i.e., five years after the purchase agreement and about seventeen months after the titles were transferred to the company. The Special Commissioners in the majority decision found that if the respondent wanted to sell the lots they could have sold them at any time even before the titles were transferred to it, as according to the agreement the seller had no alternative but to consent to the transfer or assignment. The company did not take advantage of their freedom to sell but waited for about five years after which he sold them and subsequently on January 2, 1974 acquired two shophouses in the same locality for \$180,000. In fact it was also found that the company had acquired two other shophouses in the same locality in 1965 and are still collecting rentals therefrom.
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The majority decision also took into consideration exhibit A1 which was the company's adjusted income derived from three sources namely rents, life insurance

and investments. It can be seen from the figures given in paragraph 3 of exhibit A1 that for the years 1968—1973 the receipt from rents were substantial and formed the major source of income of the company.

Authorities have shown that the term “trading” covers a wide diversity of activities and that an isolated transaction without any continuity cannot be said to be trading but may however under certain circumstances be construed as an adventure or concern in the nature of trade. But whether an isolated transaction in fact amounts to an adventure or concern in the nature of trade would depend very much on the facts and circumstances of each case.

In *California Copper Syndicate (Limited and Reduced) v. Harris*⁽³⁾ Lord Justice Clerk at page 165 said:

“It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being — Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?”

In *Leeming v. Jones*⁽⁴⁾ Rowlatt J. had to deal with the problem of what is the dividing line between the case of a man buying and selling in an isolated transaction and buying and selling in a transaction but which can be said to yield a taxable income. The proper test is found in his judgment at page 340 —

“I venture to refer, with respect, to what the Lord President, Lord Clyde, said in the case of *The Commissioners of Inland Revenue v. Livingston*.⁽⁵⁾ He is dealing with this very point and he says this: ‘I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, ‘in the nature of trade’, is whether the operations involved in its are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made’.”

Lord Russell in *Commissioners of Inland Revenue v. Reinhold*⁽⁶⁾ however felt that before a transaction can properly be regarded as “an adventure in the nature of trade” regard must be had to the “character” and “circumstances” of that particular transaction. Further down page 394 he said:

“The Lord Advocate contended that if a person buys anything with a view to sale, that is a transaction in the nature of trade; that the purpose of the acquisition in the mind of the purchaser is all-important and conclusive; and that the nature of the thing purchased and the other surrounding circumstances do not and cannot operate so as to render the transaction other than an adventure in the nature of trade. In my opinion that argument, so formulated, is too absolute and is

A not supported by the judicial pronouncements on which it was sought to be based. It takes no account of a variety of circumstances which are or may be relevant to the determination of such a question.”

Another important principle can be found in the speech of the Lord President (Clyde) in *Rutledge v. The Commissioners of Inland Revenue*⁽⁷⁾ at page 496:

B “It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade.”

But, on the question whether someone entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser’s object or intention are material. Again it was asserted that “it is no doubt true that the question whether a particular adventure is ‘in the nature of trade’ or not must depend on its character and circumstances.”

C In the dissenting decision much emphasis was given to the “badges” of trade. It must be noted however that it was never in dispute that the respondent was a family company and that after 1960 its main business was investing in houses for rental income. The engaging of a broker in the purchase concerned seen in its proper perspective would at best be a neutral factor working neither for nor against the respondent company.

Dealing with the onus on the respondent company the dissenting opinion took the failure of the respondent company to show that it had applied for approval of building or development plans over the vacant lots as a factor which vitiated its contention that the vacant lots had been bought for the purpose of investment. At page 19 of the dissenting decision it is stated that the respondent company was therefore faced with two choices, i.e., either to invest or to adventure and chose the latter course. In my view that was not a fair assessment of the facts. The position in law is that where a person acquires land and deals with it as an owner he may be regarded as holding it as an investment. What steps he would take in relation to his property should be left to him as a prudent investor. The property does not cease to be an investment merely because the taxpayer envisages the property might be sold at a profit some time later — see *Commissioners of Inland Revenue v. Reinhold*.⁽⁸⁾ In that case the taxpayer bought four houses consisting of fifteen separate occupations in 1945 and sold them about three years later. When the taxpayer appealed to the Commissioners after being assessed on the profit of the transaction he was discharged of the assessment. The case came before the First Division of the Court of Session and judgment was given unanimously against the Crown. In his judgment Lord Carmont referred to what Lord Buckmaster said in the case of *Leeming v. Jones*, *supra*:

H “...an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income.”

I The fact that it was envisaged at the time of purchase that the properties would be resold was not sufficient to take them out of the category of investment.

In the hearing before the Special Commissioners the onus was on the company to prove that the assessment against which the appeal was made was errone-

eous. It was for the company to show that the purchase and sale of the vacant lots were not an adventure in the nature of trade and therefore the gains derived therefrom were not taxable. But if looking at the facts and surrounding circumstances the only reasonable conclusion that the Special Commissioners could arrive at was that the purchase and sale of the vacant lots was not a transaction amounting to an adventure in the nature of trade then there must be some evidence which militates against that conclusion before the court can intervene and disturb the conclusion of the Special Commissioners.

What we have here as found by the Special Commissioners in their majority decision is that the respondent, a family company engaged primarily in the business of renting, had acquired landed property and after an interval of time disposed of them and substituted them with some other property which are still giving rental income to the company. Looking at the surrounding circumstances of the transaction and in the absence of any evidence to indicate that the original purchase was solely for speculative purposes it is really quite difficult not to agree with the findings of the Special Commissioners in the majority decision. I am therefore of the view that the majority decision should be confirmed and the appeal should be dismissed with costs. Order accordingly.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

KULASINGAM v. RASAMMAH

[A.C.J. (Hashim A. Yeop Sani J.)
September 3, 4, October 14 & 31, 1980]

[Kuala Lumpur — Civil Appeal No. 20 of 1979]

Family Law — Maintenance — Maintenance of wife — Whether wife left matrimonial home with sufficient reason — Entitlement to maintenance — Quantum — Maintenance of child — Whether person over twenty years old entitled to maintenance — Arrears of maintenance — Costs — Subordinate Court Rules, 1950, O. XXXVII r. 1 — Age of Majority Act, 1971 — Married Women and Children (Maintenance) Ordinance, 1950.

In this case the respondent wife had applied for maintenance for herself and her daughter who was over twenty years old. The learned Magistrate found that the respondent had left the matrimonial home with sufficient reason and was therefore entitled to maintenance. He also gave maintenance for the daughter. He fixed the amount of maintenance at \$350 but did not order payment of arrears or costs. The appellant appealed and the respondent cross-appealed on quantum, arrears and costs.

Held: (1) the learned Magistrate was correct in finding that the respondent had left the matrimonial home with sufficient reason and was therefore entitled to maintenance from her husband and that the appellant had neglected to maintain her;

(2) the Age of Majority Act, 1971 is applicable and therefore the daughter who was over 20 years old was not entitled to maintenance;

(3) there was no good reason to alter the amount awarded for maintenance by the learned Magistrate;

(4) the learned Magistrate was correct in not ordering payment of arrears of the award;

(5) the Magistrate had a discretion to award costs and as he had not properly exercised his discretion, costs would be awarded against the appellants.

A Cases referred to:-

- (1) *Yong May Inn v. Sia Kuan Seng* [1971] 1 M.L.J. 280.
- (2) *Wellesley v. Duke of Beaufort* 30 E.R. 236.
- (3) *National Assistance Board v. Wilkinson* [1952] 2 Q.B. 255, 258.
- (4) *Thomasset v. Thomasset* [1894] P. 295, 299.
- (5) *Gengler v. Gengler* [1976] 1 W.L.R. 275.
- (6) *Gangagharan v. Sathiahbama* [1979] 2 M.L.J. 77.
- (7) *Luscombe v. Luscombe* [1962] 1 W.L.R. 313.
- (8) *Pilcher v. Pilcher* [1956] 1 W.L.R. 298.
- (9) *Marimuthu v. Thirichitambalam* [1966] 1 M.L.J. 203.
- (10) *Amand v. Home Secretary & Anor.* [1943] A.C. 147.
- (11) *Chew Cheng Swee v. Chan Chye Neo* [1932] M.L.J. 5.
- (12) *Kok Heng Chow v. Lay Mee Yin* [1948] M.L.J. 157.
- (13) *Stewart v. Stewart* [1952] M.L.J. 211.
- (14) *Yap Ki Swee v. Phua Thiam Lai* [1975] 1 M.L.J. 39.

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C

CIVIL APPEAL

V.K. Palasuntharam for the appellant.

Mrs. Jegathesan for the respondent.

Cur. Adv. Vult.

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Hashim Yeop A. Sani J.: As aptly described by the Magistrate against whose order the present appeal was instituted, this is indeed a maintenance suit with a difference. To my mind, the difference lies in the fact that contrary to the object of the Married Women and Children (Maintenance) Ordinance, 1950 which is simplicity and expeditious process, this particular maintenance suit has so far taken not less than seven years to come to the present stage.

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The information for summons was taken out by the wife, Rasammah, on August 8, 1973. The maintenance suit was set down for hearing a number of times. In the meantime, an interim order for maintenance was obtained from the magistrate on May 25, 1974. Because of the successive transfers of three magistrates the case was *de novoed* three times. The present appeal is in fact from the order made at the end of the hearing before the fourth magistrate and which hearing took not less than seventeen days.

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The facts relating to the unfortunate situation between the appellant and the respondent are briefly as follows. Kulasingam and Rasammah were married in the Klang Wesley Church on November 13, 1953. Apparently the respondent came from a good and respectable family. The appellant had all along up to the time of the trial been a chief clerk of a lawyer's firm. The marriage brought forth four daughters, namely, Roslyn, Ruth, Jane and Esther. On the date when the magistrate made the order of maintenance Esther was over twenty years old although she was still living with her mother. All the three elder sisters had by then been married and were living elsewhere.

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The marital relationship between the appellant and the respondent appeared to be normal and uneventful until about the period 1971-1972 when their relationship became strained. According to the respondent this was due to the unreasonable conduct and greed of the appellant who wanted her to transfer to him her shares in the properties described in the agreement (page 269) which is the subject of another suit between the parties. The first property described therein, i.e., No. 48, Upper Kevil Road, Sentul, Kuala Lumpur, was the matrimonial home which the respon-